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Swanson Mining Reconsidered: Is Section 7 of the Wild and Scenic Rivers Act Constitutional Under the Supreme Court's New Commerce Clause Jurisprudence?

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Boise Cascade Corp. v. Board of Forestry:

The Oregon Supreme Court Opens the Door For Successful Takings Claims Under the Endangered Species Act.

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I. Introduction

The Fifth Amendment[1] of the United States Constitution prohibits governmental taking of private property for public use without just compensation. While such a taking is plainly evident when the government physically invades or appropriates private property, the advent of the administrative state and its regulatory schemes has introduced an amorphous area of takings based on overreaching land use restrictions. The Endangered Species Act[2] (ESA) creates such a regulatory scheme, where the government's interest in protecting threatened species clashes with property owners' interest in using and deriving economic benefit from their land. However, despite the hundreds of takings cases on the dockets, no federal court has issued a final ruling in favor of a takings claim under the ESA.

There are several reasons for this dearth of takings cases under the Endangered Species Act. The Act provides for incidental take permits and habitat conservation plans that allow a landowner to take species without violating the law. The availability of such lesser restrictions suggest a landowner must apply for and be denied an incidental take permit or habitat conservation plan before that owner's taking claim can be ripe for court review. Thus, incidental take permits and habitat conservation plans prevent a landowner from asserting that the ESA regulations deprive him or her of all economically viable use of property. If the government denies a landowner's request for a

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1. "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend.V.

2. 16 U.S.C. §§ 1531-1544 (2000).

permit and the restriction only affects a portion of the property, the whole parcel rule,[3] preventing the segmentation of the property, may further bar relief from the government. Finally, courts are often reluctant to find a taking because the prevailing view of the Endangered Species Act is as a narrow land use restriction, instead of a permanent prohibition of property rights.[4]

The Oregon Supreme Court rejected or ignored many of these arguments in its 1997 decision in *Boise Cascade Corp. v. Board of Forestry*,[5] which held that a landowner could prove a regulatory taking of his or her timberland by complying with Oregon's logging regulations protecting the northern spotted owl. Although the court's opinion casually glided over many significant legal controversies at stake in the case, the outcome is important for two reasons. First, by limiting its takings analysis to a portion of the company's property under an absolute logging ban, the Oregon Supreme Court signaled the demise of the whole parcel rule within the State of Oregon. Second, by finding the state's protection of the threatened species to be a regulatory taking, the court effectively embraced the conscription theory of per se takings.

This paper first examines the factual and procedural history of *Boise Cascade* and the Oregon Supreme Court's reasoning regarding the whole parcel rule and the conscription theory of takings. Next, this paper addresses the hurdles that remain for landowners seeking relief for takings by the government under the ESA. Finally, the paper discusses how takings claims are not only possible, but also an appropriate means of addressing overreaching land use restrictions under the Endangered Species Act.

II. Factual Background

Boise Cascade ("Boise") acquired 1,770 acres of commercial timberland[6] in Clatsop County, Oregon, in 1988. That same year, the Oregon Department of Fish and Wildlife listed the northern spotted owl as a threatened species. In 1990, the State Forester adopted a policy prohibiting logging within 70 acres of northern spotted owl nesting sites. The next year, Boise sold all but 64 acres of the tract. The buyer refused to purchase the 64-acre parcel because of the presence of an owl nest on the site. In 1992, Boise filed a proposal to log the 64 acres, which the Oregon Department of Forestry ("Department") denied because the plan did not provide adequate refuge for the threatened owl. A few months later, Boise submitted an amended plan for the property, which the Department also denied. However, the Department advised the company that it could log eight acres of the tract within certain time constraints.[7]

> After the Department's second denial of its logging plan, Boise filed an inverse condemnation suit in state court, alleging the denial constituted a taking of its 56-acres. In 1993, Boise, following the Department's suggestion, filed a plan to log four of the eight acres previously authorized. The Department approved the plan, but limited Boise's ability to log the property to a six-month time period during the rainy season. Boise then filed a second complaint, alleging a temporary taking of the four acres.[8]

3. See generally *infra* Part III for definition and discussion of the whole parcel principle.

4. *See* Robert Meltz, Cong. Res. Serv., The Endangered Species Act and Private Property: A Legal Primer (1993) ("A key reason why courts are not finding constitutional takings is because until now they have deemed the restrictions in wildlife statutes to be land-use controls, rather than to effect permanent physical occupations by the protected animals. . . . For this and other reasons (but stressing the difficulty of prediction in this area), it seems that few ESA impacts on private property are likely to be constitutionally compensable.").

5. Boise Cascade Corp. v. Bd. of Forestry, 935 P.2d 411 (Or. 1997) ("Boise II").

6. The tract is zoned as commercial timberland and commercial activities on the land are limited to forest operations relating to the growing and harvesting of trees. Boise Cascade Corp. v. Bd. of Forestry, 886 P.2d 1033, 1035 (Or. Ct.. App. 1994) ("Boise I").

7. Boise Cascade Corp. v. State, 991 P.2d 563, 564-65 (Or. Ct. App. 1999) ("Boise III")

8. I*d*. at 565.

The State moved to dismiss both complaints for lack of subject matter jurisdiction, ripeness and failure to state a claim. The circuit court granted the motion, which the Court of Appeals reversed.[9] The Oregon Supreme Court granted review, and affirmed in part and reversed in part.[10] The court found Boise alleged sufficient facts to show the Department deprived it of all economic viable use of the 54-acre tract but failed to allege a temporary taking of the four acres because the logging restriction was not "permanent on its face or so long lived as to make any present economic plans for the property impractical."[11]

The case was remanded to the circuit court, which granted partial summary judgment on the regulatory taking of the 56 acres. A jury returned a verdict in favor of Boise, concluding that Boise's property was taken by "physical invasion," under *Loretto v. Teleprompter Manhattan CATV Corp.*,[12] and that damages were appropriate.[13] The circuit court entered judgment for $2,279,223, which the State appealed.[14] On appeal, the state appellate court agreed with the State that the Loretto theory was inapplicable, but found the trial court properly granted summary judgment on the regulatory taking.[15] However, it found the trial court erred in striking the State's defense of ripeness because there was no indication it would be futile for Boise to pursue an incidental take permit.[16] Accordingly, the court reversed and remanded the case.[17]

III. The Whole Parcel Rule

A taking occurs when a government regulation deprives a property owner of all economically viable use of his or her property.[18] Because this test for a "regulatory taking" requires a comparison of "the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'"[19] In many cases, this issue is decided by applying the whole parcel rule – an analysis of the impact on the property as a whole rather than on individual affected segments.

The Supreme Court established the whole parcel rule in *Penn Central Transportation Co. v. New York City*,[20] where it refused to consider the deprivation of "air rights" above a building as separate from the whole property. "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[21] Instead, according to the Court, it must look at the impact of the government interference on the "parcel as a whole."[22]

However, fourteen years later, the Supreme Court called the whole parcel rule into question by indicating it may not always be ade-

9. *Boise* I, 886 P.2d at 1035.

10. *Boise* II, 935 P.2d at 416. Neither the Oregon Supreme Court, in *Boise* II, nor the appellate court, in *Boise* I, addressed the State's ripeness argument because it concerned both legal and factual issues that could not be answered based on the record. *Id.* at 416 n.7; *Boise* I, 886 P.2d at 1035 n.2. This issue would later be key in the Court of Appeals' decision to reverse and remand the jury's finding of a taking in *Boise* III, 991 P.2d at 571.

11. *Boise* II, 935 P.2d at 420–21.

12. 458 U.S. 419 (1982).

13. *Boise* III, 991 P.2d at 565.

14. *Id.* During the court proceedings, one of the owls on the Boise property died and the other left the site. Given the absence of the threatened species, the logging restrictions were lifted. The damage award was for the temporary taking of the 56 acres during the time period the logging restrictions were in place. *Id.*

15. *Id.* at 570.

16. *Id.* at 574.

17. *Id.* Boise appealed the decision, which the Oregon Supreme Court denied on October 24, 2000. Boise Cascade Corp. v. Bd. of Forestry, 331 Or. 244, 18 P.2d 1099 (Oct. 24, 2000).

18. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

19. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987).

20. 438 U.S. 104, 130–31 (1978).

21. *Id.* at 130.

22. *Id.* at 130–31.

23. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992). For an even earlier rejection of the whole parcel rule, see Nectow v. City of Cambridge, 277 U.S. 183, 186–87 (1928) (analyzing for takings purposes the 29,000 affected by the zoning regulation separately from the 140,000 total feet held by the property owner).

quate.[23] In *Lucas v. South Carolina Coastal Council*, the Supreme Court noted its requirement of a "deprivation of all economically feasible use" provides no guidance as to the property interest for measuring this diminution.[24] Although the Court expressed concern about how the lower courts and even its own opinions have inconsistently assessed the value and use of an affected property,[25] it refused to provide more than a conjecture that state law may govern this issue.[26] Thus, while the "whole parcel" or "denominator" problem remains an unsettled issue, it may not necessarily stand as an obstacle in bringing takings claims based on land use regulations, including the ESA, as *Boise* II illustrates.

In *Boise* II, the Oregon Supreme Court effectively ignored the whole parcel rule and concluded that it is proper to consider the 56-acre and 4-acre tracts owned by Boise separately for a taking analysis.[27]

With respect to the first claim for relief, the plaintiff has alleged "depriv[ation] . . . of the only economically viable use of approximately 56 acres of merchantable timber." Assuming the truth of all well-pleaded facts alleged in the complaint and giving plaintiff the benefit of all favorable inferences that may be drawn from those facts, that allegation is sufficient to meet the "deprivation of all economically viable use of the property" standard.[28]

The court cited no authority for this dramatic decision to segregate the 56-acre tract with the absolute logging prohibition from the remaining eight acres that could be logged under specified circumstances. Moreover, the court's conclusion that a taking would occur if Boise proves such facts appears to contradict its assertion that there is no taking if "the owner has 'some substantial beneficial use' of the property remaining." [29]

The Oregon Supreme Court's decision in *Boise* II appears less shocking, however, when one considers how the Oregon Supreme Court and others have grappled with this issue elsewhere. For example, the Oregon Supreme Court relied upon its decision in *Fifth Avenue Corp. v. Washington Co.*[30] to require Boise to allege the logging restriction deprives it of "all economically viable use of the property."[31] This case sheds some light on where the Boise II court gets its segmentation principle. In *Fifth Avenue Corp.*, the Oregon Supreme Court analyzed whether zoning laws constitute a taking of an owner's property. However, before the court began its takings analysis, it found it "must divide the subject property into two separate parcels" according to the different regulations imposed on each.[32] Because each parcel was zoned for specific uses, the segmentation was necessary to determine whether the specific zoning designation deprived the landowner of all use of that portion of the property.[33] Since the government regulated each parcel differently, the court was required to analyze the taking of each parcel differently.

The Ninth Circuit also adopted the *Fifth Avenue Corp.* segmentation principle in *American Savings & Loan Ass'n v. County of Marin*.[34] There, a developer alleged a taking of a portion of its

24. 505 U.S. at 1016 n.7.

25. *Id.* ("For an extreme — and, we think, unsupportable — view of the relevant calculus, see Penn Central Transp. Co. v. New York City, 42 N.Y.2d 324, 333-334, 397 N.Y.S. 2d 914, 920, 366 N.E.2d 1271, 1276-1277 (1977), aff'd, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the takings claimant's other holdings in the vicinity.").

26. *See id.* "The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property — i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." *Id.*

27. 935 P.2d 411, 420 (Or. 1997).

28. *Id.*

29. *Id.* (citing Dodd v. Hood River County, 855 P.2d 608 (1993)).

30. 581 P.2d 50 (Or. 1978).

31. *Boise* II, 935 P.2d at 419.

32. *Fifth Avenue Corp.*, 581 P.2d at 60.

33. *Id.* Although the court did find a cause of action for inverse condemnation based on the restrictions on one parcel could be stated, it did not reach the takings issues since the plaintiff failed to exhaust administrative remedies.

34. 653 F.2d 364, 370 (9th Cir. 1981) (citing *Nectow*, 277 U.S. at 187; *Fifth Avenue Corp.*, 581 P.2d at 60).

property when the county zoned two contiguous sections at different density levels. Based on the available facts, the court was unable to determine whether the two parcels would be developed differently, so as to make the zoning distinction significant, and it remanded the case.[35] However, the Ninth Circuit held that if the plaintiff was able to show the two parcels would be "treated separately when its development plans are submitted and considered," then the portion at issue "must be analyzed as a separate parcel for taking purposes."[36]

Similarly, California courts have embraced this principle in the land use setting. The Court of Appeal, in *Aptos Seascape Corp. v. County of Santa Cruz*, expressly adopted the standard established by the Ninth Circuit and restricted its analysis to the portion affected by the zoning regulation.[37] Likewise, in *Twain Hart Associates, Ltd. v. County of Tuolumne*, the court refused to adopt a rule urged by the county that the economic effect of a zoning regulation should be analyzed based on a developer's entire 8.5-acre parcel, not the 1.7-acre plot directly affected by the restriction.[38] Such a rule, the court concluded, would run contrary to the cases where "the nature of a particular land use regulation has been recognized as potentially creating separate parcels for 'taking' purposes."[39]

Accordingly, the Oregon Supreme Court's decision in *Boise* II is consistent with takings jurisprudence in the land use setting. Where the government regulates portions of an owner's property differently, the court must analyze the parcels differently for takings purposes.[40] Through its denials and qualified approvals, the Department effectively "zoned" Boise's 64 acres of commercial timberland – no use for 56 acres and restricted use for the remaining eight. By regulating the portions differently, the Department opened itself up to takings claim for each portion. The value of the whole parcel cannot be appropriately or lawfully analyzed where land use regulations restrict isolated portions of the property.[41]

Moreover, the court's decision to dismiss the whole parcel rule corresponds with the Supreme Court's decision in *Lucas*. There, the Court suggested the determination of the relative property interest affected by the land use restriction is an issue of state law.[42] In other words, state law recognition of property rights and an owner's expectations based thereupon establish the parcel affected for diminution purposes.[43] Thus, the Oregon Supreme Court simply followed the *Lucas* directive by applying state property law, as established by *Fifth Avenue Corp.*, to require the segmentation of the timberland according to the restrictions imposed.

IV. Conscription Theory of Per Se Takings

In *Penn Central*, the Supreme Court adopted an ad hoc, fact-based approach to takings claims.[44] This method, however, has led to much confusion and criticism among the lower courts and commentators. Thus, in an attempt to clarify and streamline takings jurisprudence, the Supreme Court has adopted a few "per se" analyses. Such per se takings include the physical occupation of private property by the government[45] and the total deprivation of all economically viable use of the property by government regulation.[46] If the Supreme Court gets the opportunity, it may add another area of per se takings to its jurisprudence – the conscriptive taking.

The conscription theory of per se takings is

35. *Id.* at 372.

36. *Id.*

37. 138 Cal. App. 3d 484, 496 (1982).

38. 217 Cal. App. 3d 71, 85 (1990).

39. *Id.*

40. *See Fifth Avenue Corp.*, 581 P.2d at 60.

41. *See id.*

42. *See* 505 U.S. at 1016 n.7.

43. *See id.*

44. 438 U.S. 104, 124 (1978).

45. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

46. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

an extension of the physical taking established by *Loretto*.[47] A physical taking occurs when the government actually occupies or appropriates the private property. Under the conscription theory, the government does not physically take the property, but instead institutes land use controls for a public purpose that amount to the destruction of the owner's interest in the land. In other words, the government has imposed use restrictions so severe that it might as well have actually occupied the property.

The conscription theory first surfaced in Chief Justice Rehnquist's dissenting opinion in *Keystone Bituminous Coal Ass'n v. DeBenedictis*.[48] The case involved a Pennsylvania law that prohibited the mining of coal in the support estate in order to protect the health and safety of the public.[49] A five-member majority upheld the law against a facial takings challenge, finding the public interest in preventing public nuisances and the lack of a showing of total diminution of property value prevented a taking.[50]

Chief Justice Rehnquist, joined by Justices Powell, O'Connor and Scalia, strongly disagreed with the majority's result. Noting that the coal in the support estate is a separate property interest under state law that derives its value from the ability to mine it,[51] Rehnquist considered this to be a per se taking based on government conscription of private property:

> From the relevant perspective – that of the property owners – this interest has been destroyed every bit as much as if the government had proceeded to mine the coal for its own use. The regulation, then, does not merely inhibit one strand in the bundle . . . but instead destroys completely any interest in a segment of property. In these circumstances, I think it unnecessary to consider whether petitioner may operate individual mines or their overall mining operation profitably, for they have been denied all use of 27 million tons of coal. I would hold that . . . [the law] works a taking of these property interests.[52]

Although this takings theory based on government conscription is part of a dissenting opinion, Chief Justice Rehnquist's analysis likely would be law today if the opportunity arises. With the addition of Justice Thomas, Chief Justice Rehnquist would have a five-member majority for his conscription, or "usings,"[53] holding. Accordingly, due to the current make-up of the Court, the conscription theory of per se takings is effectively good law despite the lack of majority precedent.

Moreover, the conscription theory of takings has historical support from *Pennsylvania Coal Co. v. Mahon*, the landmark case that established regulatory takings – claims based on government action that "goes too far."[54] Sixty-four years before *Keystone* but with nearly identical facts, *Pennsylvania Coal* was an "as-applied" challenge to Pennsylvania's Kohler Act. As in *Keystone*, the Act prohibited the mining of coal in the support estate. However, Justice Holmes, writing for the majority in *Pennsylvania Coal*, found the law constituted a taking because it destroyed the total value of a separate property interest recognized by state law.[55]

47. 458 U.S. at 421.

48. 480 U.S. 470 (1986).

49. *Id.* at 476-77, 485-86.

50. *Id.* at 492-93.

51. *Id.* at 517-18 (Rehnquist, C.J., dissenting) (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922) ("[T]he right to coal consists in the right to mine it.")).

52. *Id.* at 518.

53. Jed Rubenfeld, *Usings*, 102 Yale L.J. 1077, 1080 (1993). Professor Rubenfeld adopted the term "usings" to refer to circumstances "when government conscripts someone's property for state use" without compensation. *Id.* This is essentially the same takings theory as conscription by government regulation.

54. 260 U.S. 393, 415 (1922).

55. Id. at 414-15. Arguably, *Keystone* overruled the holding in *Pennsylvania Coal*, given the similar fact pattern yet dissimilar outcomes. However, Justice Stevens takes great pains in *Keystone* to distinguish *Pennsylvania Coal*, noting the earlier Kohler Act served only private interests and made it commercially impracticable to mine the coal. *See* 480 U.S. at 484-85. Justice Stevens concluded the current law served broader public interests and the plaintiffs failed to present evidence of any specific economic impact, thus there could be no taking in *Keystone*. *Id.* at 485-86.

This economic-impact analysis laid the foundation for the Court's later approach in *Lucas*,[56] but it may be a misunderstanding to interpret the Court's holding as based solely on the economic impact of the Kohler Act. Instead, what likely upset Justice Holmes was the conscriptive effect of the Act.[57] The Court's previous takings decisions[58] upheld "regulations directed at some perceived harm [that] do not . . . use the property they regulate; they merely proscribe a use to the owner or restrict him in exercising a use of his own choosing."[59] In comparison, the Kohler Act did not require the destruction of property to avoid a public harm, but required the company to put its property to state-mandated purpose of supporting others' structures. This government action making "it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating . . . it."[60] In other words, Pennsylvania had conscripted the company's property for a public use.

The Oregon Supreme Court does not expressly use Rehnquist's dissent in *Keystone*, *Pennsylvania Coal* or any related takings jurisprudence to find Boise could establish a taking of its property by the state's ESA-related regulations. Instead, the court relies on a *Lucas*-like approach, requiring Boise to allege a total deprivation of the economically viable use of the property.[61] However, by finding the state's land use restriction may equate a taking, the court has effectively embraced the conscription theory of per se takings.

In *Boise* II, the Oregon Supreme Court notes that under state law there are two ways government action may result in a taking of private property.[62] First, a taking occurs "when a present governmental action creates an expectation that the private land in question eventually will be taken for a public use."[63] Second, a taking "by inverse condemnation occurs when the government acts to 'intervene[] to straighten out situations in which the citizenry is in conflict over land use or where one person's use of his land is injurious to other.'"[64] The court does not explain under which category of takings Boise's claim falls. However, this distinction may be irrelevant, since either situation, according to the court, requires the showing of a complete deprivation of economic value of the property.[65]

Oregon's ESA-related regulations imposed an absolute ban on the logging of 56 acres of Boise's timberland and significant time constraints on the logging of four acres of its property.[66] By agreeing with Boise's assertion that the property interest in timberland is based on the right to log it, the court found the company sufficiently alleged the deprivation "of the only economically viable use of approximately 56 acres of merchantable timber."[67] Under *Lucas* and its progeny, this total diminution in value is a taking.[68]

However, the court's holding works even better under the conscription theory. For conscription, or "usings" as Professor Rubenfeld

56. 505 U.S. 1003, 1014-15 (1992).

57. Rubenfeld, *supra* note 53, at 1113.

58. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915); Mugler v. Kansas, 123 U.S. 623 (1887).

59. Rubenfeld, *supra* note 53, at 1113.

60. *Pennsylvania Coal Co.*, 260 U.S. at 414. Justice Holmes' original quote uses the phrase "appropriating or *destroying* it." *Id.* (emphasis added). Professor Rubenfeld focused on this disjunctive phrase to conclude *Pennsylvania Coal* can be viewed as either an economic-impact case (where the government destroys the value of the property) or a conscription case (where the government appropriates the property by land use controls). Rubenfeld, *supra* note 53, at 1113.

61. Boise Cascade Corp. v. Bd. of Forestry, 935 P.2d 411, 419-20 (Or. 1997) ("Boise II").

62. *Id.* at 419.

63. *Id.*

64. *Id.* at 420 (quoting Fifth Avenue Corp. v. Washington Co., 581 P.2d 50 (Or. 1978)).

65. *Id.* at 419-20.

66. Boise Cascade Corp. v. State, 991 P.2d 563, 564-65 (Or. App. Ct. 1999) ("Boise III").

67. *Boise* II, 935 P.2d at 420. It is interesting that the Oregon Supreme Court does not even dispute Boise's claim that its property has no value if it is unable to log it. This lack of analysis is hardly surprising, given the court's overall brevity in addressing the other legal arguments for the takings claim. Moreover, it lends support to the idea that the court is really applying a conscription theory since a *Lucas*-based approach normally requires more of an economic analysis.

68. 505 U.S. 1003 (1992).

refers to it, the significant factor is whether the government is requiring a parcel be put to a specific public use, not necessarily whether the government action is depriving the landowner of value.[69] Here, Oregon's restrictions were necessary for the preservation of the habitat of the threatened northern spotted owl, a protected species under the state and federal ESA.[70] By imposing severe land use controls on Boise's property, Oregon was requiring the timberland to be used for the state purpose of protecting the owl. From this perspective, Oregon's restrictions destroyed Boise's property interest "every bit as much as if the government had proceeded to [log it] for its own use."[71] In other words, Oregon conscripted Boise's property for a public use.

Accordingly, the Oregon Supreme Court's decision in B*oise* II is consistent with United States Supreme Court "precedent" of conscriptive takings. The outcome mirrors Chief Justice Rehnquist's K*eystone* dissent and the Court's opinion in P*ennsylvania Coal*. Thus, the B*oise* II decision is not groundbreaking, but instead a logical extension of established takings jurisprudence.

More significantly, B*oise* II illustrates that the effect of a government-imposed use may be as important, or even more, as the diminution of value caused by the regulation. This is especially important for ESA-related regulations, where the government requires a parcel be used for species preservation and a coinciding but less profitable private use still exists for the property. According to B*oise* II, Chief Justice Rehnquist and P*ennsylvania Coal*, such conscription of private property may still be a taking because the government has dictated a use for the property and has deprived the owner of full interest in the property. Such controls have the same effect as a government appropriation of the property and, thus, equate a taking of private property.

V. Hurdles to Takings Claims Under the ESA

The Oregon Supreme Court's decision in B*oise* II[72] is a good example of how takings claims can be brought against ESA-related regulations, despite issues of segmentation and diminution of value. In contrast, the Oregon Court of Appeals decision in B*oise* III[73] is a good example of the hurdles that still exist for landowners seeking relief from the government for overreaching ESA restrictions. Key among these hurdles is the issue of ripeness.

Like its doctrinal sisters standing and mootness, ripeness has its foundation in Article III of the Constitution, which requires federal courts hear only "cases or controversies."[74] However, ripeness also has two prudential requirements for regulatory takings claims.[75] First, a plaintiff must show he or she received a final decision from the administrating agency regarding the application of the regulations to his or her property. Second, a plaintiff must seek compensation through the procedures, if any, established under state law for such takings claims.[76]

For a property owner seeking relief from ESA-related regulations, the ability to apply for incidental take permits and habitat conservation plans prevents the property owner from demonstrating the prudential considerations of the ripeness doctrine. For example, in B*oise* III, the Oregon Court of Appeals found Boise's taking claim was not ripe since it did not seek an incidental take permit from the United States Fish and Wildlife Service before filing the claim.[77] With an incidental take permit, Boise likely would have been able to kill the owls or destroy their habitat without violating the ESA. However, even if Boise had an incidental take permit, Oregon was under no obligation to approve its logging plans.[78] Yet, the

69. S*ee* Rubenfeld, *supra* note 53, at 1111.

70, S*ee* B*oise* II, 935 P.2d at 564.

71. K*eystone* B*ituminous Coal Ass'n*, 480 U.S. at 518.

72. Boise Cascade Corp. v. Bd. of Forestry, 935 P.2d 411 (Or. 1997) ("Boise II").

73. 991 P.2d 563 (Or. Ct. App. 1999).

74. U.S. CONST. art. III.

75. Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 733-34 (1997).

76. I*d*. at 734 (quoting Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186, 194 (1985)).

77. 991 P.2d at 572-73.

78. I*d*. at 572.

court did not find such uncertainty a problem, noting Supreme Court cases do not require a possible alternative or waiver to be a "sure thing" to satisfy the ripeness doctrine.[79] Even if it was unlikely that Oregon would approve the logging of the 56 acres, the court found that Boise had to apply for the permit in order to meet the prudential requirement of the ripeness doctrine.[80]

Although no reported federal opinions have prohibited judicial consideration of an ESA-based takings claim because of the failure to pursue an incidental take permit,[81] the *Boise* III analysis is consistent with recent Supreme Court decisions and is likely the prevailing rule on the issue today.[82] Other courts have imposed the same requirement on landowners. For example, in *Four Points Utility Joint Venture v. United States*, a federal court dismissed a takings claim where the plaintiff also failed to seek an incidental take permit before filing suit.[83] By requiring these takings claims to be ripe, the courts are avoiding speculating whether the administrative agencies would have allowed the projects or activities to go forward if the incidental take permits had been granted.[84]

However, the ripeness doctrine may not be an insurmountable hurdle for landowners. Some courts have declined to require plaintiffs to seek incidental take permits before takings claims can be ripe. For example, in SDS *Lumber Co. v. State of Washington*,[85] a jury awarded $2 million to a lumber company for a taking claim brought under logging restrictions similar to those faced by Boise.[86] The trial court rejected the State of Washington's assertion that the taking claim was not ripe because the company failed to seek an incidental take permit.[87]

Moreover, property owners can take advantage of the futility exception to the ripeness doctrine. If a property owner can show any and all applications would be denied, he or she need not pursue a permit or agency approval at all for a claim to be ripe.[88] In *Lucas*, the Supreme Court did not require the landowner to apply for a building permit before filing suit, noting such an application would be futile because "the Council stipulated . . . that no building permit would have been issued . . . application or no application."[89] Under the ESA, a plaintiff can demonstrate futility by either showing the Fish and Wildlife Service would never issue an incidental take permit under such circumstances or the administrating agency would still deny a project or activity with an incidental take permit. Boise attempted this route in Boise III, but did not properly demonstrate its claim.[90]

Another hurdle that remains for property owners with ESA-based takings claims is the general perception that the ESA merely imposes a land use control, rather than permanent restriction on a property interest.[91] Land use

79. *Id.*

80. *Id.* at 572-73.

81. James Rosen, *Private Property and the Endangered Species Act: Has the Doctrine of Ripeness Stymied Legitimate Takings Claims?* 6 WEST-NORTHWEST J. of ENVTL. LAW & POL'Y 31, 31-32 (1999).

82. *See, e.g., Williamson County*, 473 U.S. 172; Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980).

83. 40 Env't Rep. Cases (BNA) 1509, 1512 (W.D. Tex. 1994).

84. *See* Southern Pacific Transportation Co. v. City of Los Angeles, 922 F.2d 498, 504 (9th Cir. 1990) (holding a taking claim was not ripe because plaintiff failed to show a final decision had been made as to the type and intensity of the proposed development); Killington, Ltd. v. State of Vermont, 668 A.2d 1278, 1282 (Vt. 1995) (finding takings not ripe because developer did not pursue a mitigation measure contained in the permit denial).

85. SDS Lumber Co. v. State of Washington, No. 93-2-00003-6 (Wash. Super. Ct., May 12, 2000); *see also* Envtl. Policy Ctr., *Takings Snapshot*, Vol. 33, May 12, 2000, *at* www.law.georgetown.edu/gelpi/takings/courts/snaps/snap33.htm

86. *See* Envtl. Policy Ctr., *Takings Snapshot*, Vol. 33, May 12, 2000 *at* www.law.georgetown.edu/gelpi/takings/courts/snaps/snap33.htm

87. *See id.*

88. *See* Rosen, *supra* note 81, at 34.

89. 505 U.S. 1003, 1014 n.3 (1992).

90. 991 P.2d at 573-74. The Oregon Court of Appeals rejected Boise's defense because the company attempted to demonstrate futility by reference to a trial exhibit. *Id.* at 573. The court found it could not answer the question of whether the trial court erred in rejecting the state's defense of ripeness based on reference to trial exhibits. *Id.* In addition, the court noted the exhibits did not demonstrate it would have been futile for Boise to pursue an incidental take permit. *Id.* at 574.

91. *See* MELTZ, *supra* note 34.

controls are rarely held to constitute a taking and landowners have difficulty procuring compensation for such effects.[92] This hurdle is somewhat lessened by interpreting ESA-based takings claims under a conscription theory rather than a Lucas-style approach, since for conscriptive takings, the court analyzes the appropriating effect of the government regulation rather than the diminution of property value.[93]

Oregon has also attempted to minimize this hurdle with the passage of Measure 7, a significant takings public referendum. Measure 7, a constitutional amendment, compels state and local governments to compensate landowners for any diminution of property value resulting from state and local regulations.[94] Measure 7 exempts "historically and commonly recognized nuisance laws" from its reimbursement requirements. However, the measure does apply retroactively, so property owners that have continuously owned their properties since regulations have been imposed would be able to apply for compensation.[95]

On November 7, 2000, the people of Oregon voted to approve Measure 7, 53-percent to 47-percent.[96] Despite this wide margin of approval, the opposition to Measure 7 has been extremely vocal, especially from local governments fearing they can no longer enact land use regulations without depleting their coffers through compensation payments. Several parties have filed lawsuits to block Measure 7 from taking effect.[97] Responding to one such suit, Marion County Circuit Court Judge Paul Lipscomb granted a motion on December 6, 2000, to temporarily bar the law from taking effect to address challenges that the measure was not adopted in a manner consistent with the Oregon Constitution.[98]

Whether Measure 7 will actually take effect is now in doubt. The measure, along with similar, although not as far-reaching, laws adopted by Florida and Texas,[99] represents a general recognition that land use controls may decrease property values and erode owners' interests in their lands. This is especially important for takings claims under ESA-related state regulations, where the government controls are not merely zoning laws created for aesthetic or consistency purposes, but instead are requirements of private owners to put their properties to an albeit important, but also public, use. Since even such severe land use controls are often not viewed as compensable,[100] state enactments such as Measure 7 are often necessary to overcome this hurdle and ensure private owners are not exploited in the name of the public good.

VI. Appropriate Takings Claims Under the ESA

The Oregon Supreme Court decision in Boise II[101] illustrates an important and sweeping proposition – that takings claims are an appropriate means to address overreaching ESA regulations. It is appropriate to address overreaching ESA regulations through a takings claim. Although this seems to be a simple and hardly groundbreaking idea – Justice Holmes certainly would agree that an ESA regulation that "goes too far" would constitute a taking[102]

92. *Id.*

93. *See generally supra* Part IV.

94. Ballot Text and Full Text of Ballot Titles – Measure 7, Oregon General Election, Nov. 7, 2000, *at* http://www.sos.state.or.us/elections/nov72000/measures/46.pdf (last visited Jan. 6, 2001).

95. *Id.*

96. *Election Results – Measures*, Oregon Live, Nov. 11, 2000, at http://www.oregonlive.com/special/politics/index.ssf?/special/politics/measure_results2.frame (last visited Jan. 6, 2001).

97. *See, e.g.*, McCall v. Kitzhaber, No. 00C19871 (Marion County Cir. Ct. filed 2000); *See also* Suzanne Marta, *Swaim, Groups Sue to Block Measure 7*, STATESMAN-JOURNAL (Salem, Or.), Nov. 28, 2000; Scott Maben, *City of Eugene Will Fight Measure 7 in Court*, THE REG.-GUARD (Eugene, Or.), Nov. 28, 2000.

98. McCall v. Kitzhaber, No. 00C19871 (Marion County Cir. Ct. Dec. 6, 2000) (order granting preliminary injunction).

99. Joe Mosely, *Measure 7: Property Rights v. Land Use Laws*, THE REG.-GUARD (Eugene, Or.), Oct. 8, 2000.

100. *See* Meltz, *supra* note 4.

101. Boise Cascade Corp. v. Bd. of Forestry, 935 P.2d 411 (Or. 1997) ("Boise II").

102. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

– many commentators have disputed the use of the Fifth Amendment to address property issues under the ESA.[103]

Prime among many commentators' concerns is the common law nuisance principle that prevents a landowner from claiming immunity from species protection laws.[104] The Supreme Court in Lucas reiterated this principle by stating laws that merely repeat limitations contained in the title of the property, as defined by state nuisance laws, cannot constitute a taking.[105] According to Glenn Sugameli, "[l]aws protecting and regulating wildlife are a traditional, common component of state property law and state police powers," thus cannot be the basis of a takings claim.[106]

Moreover, Sugameli notes, even if a takings claim does not invoke the nuisance law principle, there are other reasons why ESA-related regulations do not cause takings issues:

> First, it is not a taking to regulate only part of the "parcel as a whole," in terms of acreage or of time. Second, prohibiting only particular uses of land, while permitting others, does not cause a taking. . . . Finally, species protection typically includes case-by-case flexibility and no property has been taken from those who obtain variances or permits that allow activities that incidentally "take" (harm) protected wildlife.[107]

Sugameli's comments are applicable to factual situations such as in *Christy v. Hodel*, where the landowner was attempting to claim protected bears were actually government agents that physically occupied his property, *Loretto*-style.[108] However, his argument has little impact in a case such as *Boise* II, where the land use controls actually conscript a private owner's property and prohibit a long-standing and proper use of the land. In such cases, a takings claim is an appropriate and necessary means of addressing such regulations for several reasons.

First and foremost, Boise was not seeking an exemption from any common law principle preventing the destruction of a public resource. The company was trying to use its property in the method proscribed by state law – logging.[109] In *Boise* III, the state attempted to use the nuisance proposition from *Lucas* to claim it cannot be liable to the company for refusing to permit activity that would constitute a public nuisance. The court of appeals rejected the defense, noting there was "no authority for the proposition that knocking down a bird's nest on one's property has ever been considered a public nuisance."[111]

Second, as discussed in Part III, *Boise* II illustrates how the whole parcel rule does not prevent the court from segmenting a tract of property according to the differing regulations imposed. This approach has its support in the Supreme Court's majority opinion in *Lucas* and in other courts' analyses of takings claims under land use regulations.[112]

Moreover, prohibiting a use of the land while permitting others can result in a taking if the government is effectively appropriating the property for a state-mandated use.[113] Although *Boise* II does not expressly apply the conscription theory of per se takings, the court's abbreviated discussion of the diminution principle and the actual outcome of the case support a

103. *See, e.g.*, Glenn P. Sugameli, Why Laws to Protect Species Do Not Cause Fifth Amendment Takings of Private Property (Feb. 1996) (unpublished manuscript on file with author).

104. *Id.*

105. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027, 1029 (1992).

106. Sugameli, *supra* note 103.

107. *Id.*

108. 857 F.2d 1324 (9th Cir. 1988).

109. *See* Boise Cascade Corp. v. Bd. of Forestry, 886 P.2d 1033, 1035 (Or. Ct. App. 1994) ("Boise I").

110. Boise Cascade Corp. v. State, 991 P.2d 563, 570 (Or. Ct. App. 1999) ("Boise III").

111. *Id.* at 570.

112. *Supra* Part III.

113. *Supra* Part IV.

finding of a conscriptive taking.

Sugameli's final point, that a case-by-case analysis of takings claims under ESA-related regulations discourage claims due to the availability of variances and incidental take permits, obviously has impact in cases such as B*oise* II. As discussed in Part V, the availability of incidental take permits represent a significant hurdle to takings claims, especially under the ripeness doctrine. In addition, if a landowner is able to get such a permit, the likelihood of a takings claim succeeding is remote. However, this is only an obstacle for plaintiffs to overcome, not a blanket reason to bar takings claims altogether under the ESA. Accordingly, as B*oise* II demonstrates, landowners should use the Fifth Amendment to address the conscriptive effect of ESA-related regulations and seek the compensation from the government.

VII. Conclusion

The Oregon Supreme Court's decision in B*oise Cascade Corp. v.* B*oard of* F*orestry* illustrates how a successful takings claim can be brought under ESA regulations. By ignoring the whole parcel rule, the Oregon Supreme Court opened the door for future claims based on regulations that affect discrete portions of a property. The court's ruling also effectively embraces the conscription theory of per se takings, allowing for future claims based on regulations that appropriate property for a public use, but do not completely decrease the land's value. Although hurdles still exist for ESA-related takings claims, as evident in the case's subsequent proceedings, even obstacles such as the ripeness doctrine can be overcome. Accordingly, B*oise* II demonstrates that takings claims under ESA-related regulations are not only possible, but also represent an appropriate means of addressing overreaching land use controls.